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No. 83-408

IN THE

Supreme Court of the United States

October Term, 1983

CANADIAN HIDROGAS RESOURCES, LTD., a Canadian corporation; HIDROGAS LTD., a Canadian corporation; HIDROGAS INC., a Montana corporation; and DANFORD E.E. BODRUG and NATIONAL TRUST COMPANY, LTD., the executors of the Estate of EVAN W.G. BODRUG,

Petitioners,

vs.

MGPC, INC., a Wyoming corporation,

Respondent.

On Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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Questions Presented.

1. Whether the Court of Appeals correctly found that interpretation of federal regulations is an issue of law for decision by the trial court and not an issue of fact that is a component of a party's burden of proof.

2. Whether the Court of Appeals, having so concluded, may remand an action to the trial court, instructing it to interpret pertinent federal price control regulations, finding it had not previously done so, and directing it to apply its interpretations to the facts presented at trial by the parties in order to ascertain the lawfulness of the contract price charged by respondent to petitioner for propane.

3. Whether the Court of Appeals correctly directed the trial court that, in the event federal pricing regulations cannot supply a price for propane during the contract term, the trial court may find the contract standard failed and may then substitute a reasonable price in accordance with the Uniform Commercial Code, to prevent unjust enrichment of the buyer, petitioner herein.

TABLE OF CONTENTS

Page

Questions Presented i
Opinion Below 1
Jurisdiction 1
Statement of the Case 2
Summary of Argument 5
Reasons for Denying the Writ 8

I.

TECA's Decision Is Correct and Does Not Conflict With Prior Decisions of This Court, of TECA, nor With Decisions of Other Courts 8

II.

The Judgment Below Is Interlocutory and Not Yet Ripe for Review by This Court 12

III.

This Action Presents No Constitutional Questions, No Questions of Statutory Construction, and No Questions of Ongoing Importance 12

IV.

Conclusion 14

TABLE OF AUTHORITIES CITED

Cases	Page
Bernina Distributors, Inc. v. Bernina Sewing Machine Co., 646 F.2d 434 (10th Cir. 1981)	6, 10, 11
Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R., 389 U.S. 327, 88 S.Ct. 437 (1967)	12
Gulf Oil Corp. v. DOE, 671 F.2d 485 (TECA 1982)	8
Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 36 S.Ct. 269 (1915)	12
Kelley v. Everglades Drainage District, 319 U.S. 441 63 S.Ct. 1141 (1943)	12
Longview Refining Co. v. Shore, 554 F.2d 1006 (TECA 1977)	12
McCulloch Gas Processing Corp. v. DOE, 650 F.2d 1216 (TECA 1981)	8, 13
Mobil Oil Corp. v. FEA, 566 F.2d 87 (TECA 1977)	8
National Helium Corp. v. FEA, 569 F.2d 1137 (TECA 1977)	8
North Central Airlines v. Continental Oil Co., 574 F.2d 582 (D.C. Cir. 1978)	5, 6, 10
People v. Dickerson, 273 Cal.App.2d 645, 78 Cal.Rptr. 400 (2d Dist. 1969)	9
Standard Oil Co. v. DOE, 596 F.2d 1029 (TECA 1978)	8
Twin City Barge & Towing Corp., et al. v. Schlesinger, 603 F.2d 197 (TECA 1979)	8, 10
U.S. v. 320.0 Acres of Land More or Less, etc., 605 F.2d 762 (5th Cir. 1979)	9

Regulations	Page
10 C.F.R. 210.62(a)	11
10 C.F.R. Part 212, Subpart E	3, 4, 8
10 C.F.R. Part 212, Subpart K	3, 4, 8
39 Fed.Reg. 1924, Jan. 15, 1974	11
39 Fed.Reg. 44407, Dec. 24, 1974	4
40 Fed.Reg. 23272, May 29, 1975	4
46 Fed.Reg. 9909, January 30, 1981	5, 13
2 FEA ¶84,901 (Aug. 19, 1975)	4
Statutes	
12 U.S.C. 1904, note Section 211(b)	2, 8
12 U.S.C. 1904, note Section 211(g)	1
15 U.S.C. 751	4, 8
15 U.S.C. 754	2
15 U.S.C. 754(a)	8
28 U.S.C. 1254(1)	1
California Commercial Code §2305(a)	5

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vs.

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Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinion Below.

The Opinion of the Temporary Emergency Court of Appeals ("TECA") (Petition, Appendix A-17 - A-22) is not reported.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 12 U.S.C. 1904, note Section 211(g). In the District Court, jurisdiction was founded upon diversity of citizenship. Specifically, it was alleged and established that MGPC, Inc.[1] ("MGPC"), a Wyoming corporation, sold

[1]MGPC, Inc. is a wholly-owned subsidiary of MCO Holdings, Inc., a publicly traded corporation.

propane under a written contract between April, 1974, and February, 1975, to the petitioners, Canadian and Montana corporations. The Court of Appeals noted it has jurisdiction to interpret the mandatory petroleum price regulations issued pursuant to 15 U.S.C. 754 and 12 U.S.C. 1904, note Section 211(b), referenced in that contract.

Statement of the Case.

Between April, 1974, and March, 1975, MGPC sold propane to Hidrogas, Ltd. and Hidrogas, Inc. (which, together with their *alter ego* parent, Canadian Hidrogas Resources, Ltd., are collectively referred to herein as "Hidrogas") pursuant to a contract evidenced by a series of telex communications. Hidrogas agreed therein to pay MGPC the *highest price permissible* under the mandatory price regulations of the Federal Energy Office ("FEO"). Such purchases took place from three separate plants operated by MGPC in Wyoming and Montana. MGPC invoiced Hidrogas at 17 cents per gallon for propane sold at the Oedekoven plant, 18 cents per gallon for propane sold at the Gillette-Kitty plant, and 16.25 cents per gallon at the Fairview plant.

Although Hidrogas recorded MGPC's full invoiced prices on its accounting books and calculated its own resale prices based upon MGPC's invoiced prices, Hidrogas remitted to MGPC only 8.25 cents per gallon for propane from the Oedekoven and Gillette-Kitty plants. Hidrogas has asserted that it expected to pay no more under the contract (Petition at 5) notwithstanding its agreement to pay the highest permissible price, its payment of 16.25 cents to MGPC for propane at Fairview, and its payment of even greater sums to other supplies for propane at the very same time.

MGPC brought suit to collect the difference between the amounts it invoiced and the lower amounts it received from

Hidrogas. At trial, MGPC presented expert testimony that its maximum price under federal regulations was greater than its invoiced price, and thus it was entitled to the full amount of $879,163.28 which it sought, as well as pre-judgment interest. Hidrogas presented expert testimony that expressly assumed full payment of the invoiced amounts had been made by Hidrogas to MGPC; that testimony quarreled only with $60,000 of the total amount prayed for by MGPC. The District Court also received oral and deposition testimony from current and former employees of the Department of Energy ("DOE").

In the District Court's judgment issued February 10, 1983, MGPC was awarded its full invoiced price with respect to propane purchased at the Fairview plant; at that plant, for several months, Hidrogas had paid the invoiced price, so that this recovery amounted to only $4,042.37. Making only a single general reference to the Subpart E and K price regulations and without interpreting any of their terms or provisions, the District Court concluded as to propane sold at MGPC's other plants that the interpretation of federal price regulations was a question of fact and thus an element of MGPC's burden of proof. The District Court summarily declared MGPC had failed to meet its burden of proof.

During 1974, the price regulations of the FEO (succeeded in mid-year by the Federal Energy Administration ("FEA")) were published at 10 C.F.R. Part 212; those regulations did not specifically refer to independent gas processors, of which MGPC is one. In July, 1974, the agency concluded that its crude oil refiner price controls (10 C.F.R. Part 212, Subpart E ("Subpart E")) governed gas processors, but gave no instruction on how such regulations were to be applied. This was a critical and confusing omission because the feedstock for gas processors is not crude oil, but natural gas, exempt from allocation and price controls under the Emergency

Petroleum Allocation Act ("EPAA"), 15 U.S.C. 751, *et seq.*, and the manufacturing technology and characteristic costs incurred by gas processors are very different from those of crude oil refiners.

In September, 1974, FEA acknowledged its crude oil refiner regulations were unsuited to gas processors and proposed new regulations which were adopted effective January 1, 1975 (39 Fed.Reg. 44407, Dec. 24, 1974), and which appear at 10 C.F.R. Part 212, Subpart K ("Subpart K"). As these regulations were prospective in effect, the agency had yet to address the application of the pricing regulations to gas processors for transactions in 1974. Therefore, FEA issued Ruling 1975-6 (40 Fed.Reg. 23272, May 29, 1975), defining increased product costs under Subpart E, retroactively for 1973 and 1974, to be identical to those in effect prospectively under Subpart K in 1975. Under the pricing regulations, sellers of petroleum products could only increase their selling prices to reflect increased costs. Subsequently, FEA made additional portions of the Subpart K regulations retroactive to 1974. *See* Class Exception, 2 FEA ¶84,901 (Aug. 29, 1975).

The District Court correctly ruled that "determining the maximum lawful price during the contract period *requires* an *interpretation* of a number of essential terms and concepts used in the *regulations*." (Petition, Appendix at A-12) (Emphasis added). As TECA noted, however, the District Court did not act upon its own logic; on appeal, TECA held that:

> "The trial court had a duty to decide which of the interpretations advanced by the parties was correct or to apply its own interpretation. The court was entitled to consider the arguments offered by the parties, but it could not treat the meaning of the regulations as a question of fact to be proven by them.

"Since the trial court has not interpreted the regulations relevant to deciding the maximum lawful price, this case will be remanded. On remand, the trial court must first interpret the relevant terms and concept used in Subparts E and K of 10 C.F.R. §212 and Ruling 1975-6, in addition to any other regulations or rulings the court finds applicable." (Petition, Appendix at A-21).

TECA acknowledged the trial court's concerns that the 1974-75 price regulations were ambiguous (*see*, Petition, Appendix at A-10, A0-11) and suggested that the regulations, even when interpreted, *might* not supply a formula for ascertaining a ceiling price. In that event, TECA ruled that "a reasonable price is to be substituted" if the agreed-upon contract standard failed, referring to *California Commercial Code* §2305(1) and to *North Central Airlines v. Continental Oil Co.*, 574 F.2d 582, 592 (D.C. Cir. 1978). (Petition, Appendix at A-22).

This litigation only involves transactions *predating* February, 1975. At that time, the Hidrogas companies withdrew to Canada and ceased purchases from MGPC. The last DOE price controls were repealed by Executive Order No. 12287 (46 Fed.Reg. 9909, January 30, 1981). There are *no price controls* presently governing gas processors, nor governing the selling price of propane.

This litigation presents *no* constitutional questions, *no* issues of statutory construction, and *no* final judgment below.

Summary of Argument.

TECA held that the District Court was obliged to interpret the DOE's price control regulations in order to apply those regulations to facts presented by the parties and thus to derive a maximum lawful selling price for propane. With that task completed, the District Court could compare the

maximum price to each invoiced price charged by MGPC to Hidrogas and determine whether and in what amounts the contract between the parties had been breached. Extensive briefs and detailed oral and deposition testimony were offered by the parties to aid the District Court in this endeavor; the total failure of the District Court to grapple with the regulations and provide adequate findings explaining its interpretations thereof and conclusions therefrom required remand by TECA.

The trial court has been instructed to consider whatever regulations and rulings it deems relevant to determine a maximum lawful selling price; specific direction has been given to it suggesting various particular regulations and factors to be weighed by the trial court. There is nothing impossible in the instructions of TECA, contrary to petitioner's argument: The District Court has simply been directed to perform a task it failed to undertake earlier in the litigation.

Petitioner has claimed *no* conflict between decisions[2] warranting review by this Court, *no* constitutional questions, and *no* issues of statutory interpretation; and there are no such issues in the litigation. At bottom, this is a commercial dispute involving transactions completed between April, 1974, and February, 1975, under regulations repealed sev-

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[2]Alert that substantial confusion prevailing during the formative months of price controls, when the subject transactions took place, might lead the District Court to conclude no price could be ascertainable by application of the price controls, TECA instructed that a reasonable price could thereafter be substituted in the contract to prevent unjust enrichment. TECA's decision is in conformity with *North Central Airlines v. Continental Oil Co.*, 574 F.2d 582 (D.C. Cir. 1978); *Bernina Distributors, Inc. v. Bernina Sewing Machine Co.*, 646 F.2d 434 (10th Cir. 1981), cited by petitioner, is factually distinguishable and not contrary: It involved a contract with specific comprehensive price terms unaffected by regulations, unlike the brief term in the instant contract and the contract in *North Central, supra*.

eral years ago; the dispute is of little consequence, except to the litigation.

After completion of the District Court's analysis on remand, and *after* an opportunity for appellate review by TECA of that remand, *if* there remains any occasion for review by this Court, it can *then* appropriately be evaluated in light of a *complete* legal and factual record.

REASONS FOR DENYING THE WRIT.

I.

TECA's Decision Is Correct and Does Not Conflict With Prior Decisions of This Court, of TECA, nor With Decisions of Other Courts.

In the interpretation of petroleum price regulations adopted pursuant to the EPAA, 15 U.S.C. 751, *et seq.*, TECA has been granted exclusive appellate jurisdiction by Congress. 15 U.S.C. 754(a) and 12 U.S.C. 1904, note Section 211(b). Thus, no Court of Appeals other than TECA has construed the Subpart E or Subpart K regulations. Further, this Court has not previously granted certiorari nor heard appeals from any decision by TECA involving the Subpart E or Subpart K regulations. Thus, there are no conflicting decisions by other federal appellate courts.

In more than 100 cases, TECA has examined and interpreted DOE's petroleum price regulations. On various occasions, it has considered the price regulations governing sales of propane. *See, e.g., Mobil Oil Corp. v. FEA*, 566 F.2d 87 (TECA 1977); *National Helium Corp. v. FEA*, 569 F.2d 1137 (TECA 1977); *Twin City Barge & Towing Corp., et al. v. Schlesinger*, 603 F.2d 197 (TECA 1979); *McCulloch Gas Processing Corp. v. DOE*, 650 F.2d 1216 (TECA 1981); and *Gulf Oil Corp. v. DOE*, 671 F.2d 485 (TECA 1982). There are no conflicts or inconsistencies between TECA's decisions in these cases, nor with TECA's decision in the instant case, nor has petitioner argued to the contrary.

In concluding that interpretation of federal regulations is a question of law to be determined by the trial court and not a question of fact to be proven by the parties, TECA's decision is entirely consistent with its own precedent, *Standard Oil Co. v. DOE*, 596 F.2d 1029, 1066 (TECA 1978),

as well as with the law elsewhere. *See, U.S. v. 320.0 Acres of Land More or Less, etc.*, 605 F.2d 762, 818-819 (5th Cir. 1979); *see* Petition, Appendix at A-31.

Neither is the decision of TECA below in conflict with the California cases cited by petitioner (*see*, Petition at 9-10). Each of those state statutes and cases distinguish between matters of fact, as to which a party is required to bear its burden of proof, and matters of law, reserved for the Court. Petitioner's citations, from intermediate state courts of appeals, each involve questions of fact, such as choosing between conflicting descriptions of events offered by opposing witnesses, as in *People v. Dickerson*, 273 Cal.App.2d 645, 78 Cal.Rptr. 400 (2d Dist. 1969). *See*, Petition at 10. Construction of statutes presents a judicial task, however, and not a question of which of two conflicting stories to believe.

TECA has not imposed an "impossible" task for the District Court upon remand but has only required the trial court to interpret relevant concepts in federal regulations and *then* to apply the facts presented at trial to those concepts to ascertain a maximum lawful selling price. That price should be compared with the involved prices to determine whether or not a breach of contract exists and, if so, the amount of damages suffered by MGPC. The District Court simply did not undertake the task which TECA has now required of it.

As an alternative to characterizing TECA's decision as mandating the impossible, petitioner has attempted to establish a conflict between the final paragraph of TECA's decision and the pervasiveness of DOE's price controls, arguing that TECA's decision directs the District Court "to ignore these federal regulations." (Petition at 12). This argument by petitioner mischaracterizes TECA's decision.

TECA has required the District Court *first* to examine the price regulations applicable to gas processors in 1974 and early 1975. With respect to those regulations for that period, TECA itself has acknowledged:

> "A reading of the refiner regulations, however, raises some doubt as to whether they were specifically designed to apply to natural gas processing plants. . . . There was no clearly applicable regulation or precise method by which a gas plant operator could have calculated his maximum allowable level of product prices. . . . This situation could only lead to confusion as to the lawful prices that NGL plant operators and marketers could charge and consumers could pay." *Twin City Barge & Towing Co. v. Schlesinger*, 603 F.2d 197, 200 and n.3 (TECA 1979).

Recognizing the possibility that the District Court might decide itself unable to apply the pricing regulations and ascertain a maximum lawful selling price during this period, TECA has addressed the possibility that the contract standard, "the highest permissible price," would fail of its purpose. In such circumstances, the substitution of a reasonable price, consistent with price controls, is warranted. *North Central Airlines v. Continental Oil Co.*, 574 F.2d 582 (D.C. Cir. 1978). In reaching this conclusion, TECA is clearly acting harmoniously with the other circuits, and is not in conflict therewith. By the same token, it has not authorized the District Court to ignore the price regulations, but only to decide the case before it if those regulations prove impossible of application to a given set of transactions.

Petitioner has cited *Bernina Distributors, Inc. v. Bernina Sewing Machine Co.*, 646 F.2d 434 (10th Cir. 1981) in support of its position, but that case is distinguishable from *North Central Airlines, supra*, and from the instant case. In *Bernina*, the Tenth Circuit observed:

> "The contract provisions here are quite comprehensive concerning base prices and modifications pursuant to cost increases and invoice, duty, shipping, insurance, and the like." 646 F.2d 434, 439.

There, an importer, aware of a devaluation of the dollar against the Swiss franc, thereafter executed a contract containing comprehensive pricing provisions, but lacking any price adjustments to reflect international currency fluctuations. Under these circumstances, the Court concluded that the "open price term" provisions of the Uniform Commercial Code were simply not applicable. Thus, a "reasonable price" could not be substituted for the contract price.

The present case is very different, for the brief price term in the contract is that it shall be the "highest price permissible." If the regulations which restrict prices prove not to be susceptible of application for 1974-1975, then a "reasonable price" is the only equitable alternative. It was clearly not the intent of Congress in adopting the EPAA, nor of the FEO, FEA, or the DOE, to permit purchasers of petroleum products to acquire and consume them without paying therefor. *See*, 10 C.F.R. 210.62(a) ("Nothing in this paragraph shall be construed to require sellers to sell to purchasers who do not arrange proper credit or payments for allocated products") 39 Fed.Reg. 1924, Jan. 15, 1974.

In any event, TECA has instructed the District Court only to consider "a reasonable price" *after* it has first interpreted DOE price regulations and been unable to apply them so as to ascertain a lawful selling price. Any appellate review of these issues should appropriately await consideration and a decision on remand by the District Court, followed by an opportunity for TECA to examine the District Court's interpretations and reasoning, thereby fulfilling its historical ap-

pellate function of applying its particular expertise and assuring uniformity in the construction of the DOE price regulations.

II.

The Judgment Below Is Interlocutory and Not Yet Ripe for Review by This Court.

Given the complexity of DOE's price controls, TECA has insisted that "precise findings of fact by the District Court are of paramount importance. . . ." *Longview Refining Co. v. Shore*, 554 F.2d 1006, 1011 (TECA 1977). TECA held the District Court had failed to interpret the individual terms and concepts of the price regulations and to apply those interpretations to the facts and detailed calculations that were the subject of testimony by the parties at trial. Petition, Appendix at A-21. Thus, the District Court fell short of the standard articulated by this Court in *Kelley v. Everglades Drainage District*, 319 U.S. 441, 442, 63 S.Ct. 1141, 1145 (1943), that "there must be findings . . . that are sufficient to indicate the *factual basis* for the ultimate conclusion." TECA has therefore remanded the matter to the District Court for more detailed analysis and findings.

The lack of finality of TECA's judgment itself furnishes sufficient ground for the denial of certiorari. *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 88 S.Ct. 437 (1967); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-258, 36 S.Ct. 269, 271 (1915).

III.

This Action Presents No Constitutional Questions, No Questions of Statutory Construction, and No Questions of Ongoing Importance.

The Petition herein does not purport to describe any constitutional issues or questions of statutory interpretation of the EPAA presented for review by this Court. Although the

Petition asserts that this case "deals with federal energy policy and regulations which directly affect the national economy" (Petition at 14), this is simply not so. The last DOE petroleum price regulations were repealed more than two years ago. 46 Fed.Reg. 9909 (Jan. 30, 1981). There are *no* price controls governing gas processors nor the selling price of propane nor of other refined petroleum products.

The present case involves transactions which occurred between April, 1974 and February, 1975, during the very formative stages of federal petroleum price controls. Whatever the final judicial result interpreting those controls as applied to these transactions, that result will *not* be of significance to the national economy or to the present time. The fact that the FEA changed its regulatory program in January, 1975, and abandoned its former method of controlling the prices of gas processors under Subpart E underscores the lack of significance to present conditions that this case bears. It is a dispute of limited consequence to the parties, but hardly otherwise. For transactions in later periods, there has developed a richer record of contemporary DOE interpretations and of judicial constructions of the evolving price regulations. *See, e.g., McCulloch Gas Processing Corp. v. DOE*, 650 F.2d 1216 (TECA 1981).

Congress and this Court have left to TECA the task of developing a consistent body of case law for the interpretation of DOE price control regulations. In the present case, after the District Court has completed its remand, TECA should be given an opportunity to review the trial court's final judgment, applying its expertise and maintaining a uniformity of interpretation of the DOE price controls. *Then*, if review by this Court is warranted, it can be afforded with a fully developed factual and legal record.

With so many claimants petitioning for review by this Court, surely the first writ of certiorari to TECA could be

granted in a case of greater significance, involving larger principles or national policies. There is *nothing* here which implicates the effectiveness of ongoing governmental programs or of future energy controls.

IV.
Conclusion.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

October 11, 1983.

Respectfully submitted,

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